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Issue Date: 19 June 2003

Case No.: 2002-LHC-1875

OWCP No.: 07-130637

In the Matter of:

GEORGE HERRLE,
Claimant

v.

AVONDALE INDUSTRIES, INC.,
Employer

APPEARANCES:

DOUGLASS M. MORAGAS, ESQ.,
On Behalf of the Claimant

JENNIFER CORTEZ, ESQ.,
CHRISTOPHER M. LANDRY, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act" or "LHWCA"). The claim is brought by George Herrle, Claimant, against his former employer, Avondale Industries, Inc. ("Avondale"), Respondent. Claimant asserts he has employment-related knee and back conditions for which Avondale is responsible. A hearing was held on February 10, 2003 in Metairie, Louisiana, at which time the parties were given the

opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence¹:

- 1) Joint Exhibit No. 2;
- 2) Claimant's Exhibits Nos. 1-8; and
- 3) Respondent's Exhibits Nos. 1-23.

This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS²

The Court finds sufficient evidence to support the following stipulations:

- 1) This case is governed by the LHWCA.
- 2) On July 12, 1993, Claimant sustained an injury to his right knee within the course and scope of his employment with Avondale when Claimant tripped over a cable that was on the deck of a ship.
- 3) At the time of the accident, Claimant was employed by Avondale as a pipefitter.
- 4) Avondale was advised of Claimant's knee injury on July 12, 1993.
- 5) A Notice of Controversion was filed on March 20, 1998.
- 6) An Informal Conference was held on February 19, 1998.
- 7) Claimant's average weekly wage at the time of his injury was \$470.00.
- 8) Avondale paid to Claimant temporary total disability benefits from July 17, 1993 until August 24, 1993, from September 17, 1993 until September 6, 1995, and from July 8, 1996 until June 9, 1997, at a weekly rate of \$313.33.

¹ The following abbreviations will be used in citations to the record: JX - Joint Exhibit; CX - Claimant's Exhibit, RX - Respondent's Exhibit, and TR - Transcript of the Proceedings.

² JX-2; TR. 6-7.

- 9) Avondale paid to Claimant partial disability benefits from September 7, 1995 until October 4, 1995, at a weekly rate of \$166.27.
- 10) Avondale paid to Claimant 86.4 weeks of scheduled permanent partial disability benefits for his knee injury, at a weekly rate of \$313.33.
- 11) Claimant reached maximum medical improvement in this case on July 8, 1997.

ISSUES

The unresolved issues in these proceedings are:

- (1) Fact of Injury and Causation;
- (2) Nature and Extent of Disability;
- (3) Reasonable and Necessary Medical Benefits; and
- (4) Attorney's Fees.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

George Herrle

Mr. Herrle was born on April 16, 1933. TR. 33. He testified that he was injured at Avondale on or about July 12, 1993, when he fell and twisted his leg while attempting to step over cables on the deck of a ship. TR. 22. At the time of his injury, Mr. Herrle was employed as a pipefitter at Avondale and had been working for Avondale for 24½ years. TR. 21. Mr. Herrle testified that for the past ten years, he has been at home with his wife. TR. 77.

Through workers' compensation, Mr. Herrle came under the care of Dr. Charles Johnson. TR. 23-24. Dr. Johnson performed three surgeries on Mr. Herrle's knee: an arthroscope, a knee replacement, and a second knee replacement. TR. 24, 35, 58. According to Mr. Herrle, his knee still had not improved after the final surgery and he continued to be in pain. TR. 36. Mr. Herrle testified that he was discharged by Dr. Johnson on March 13, 2001, after Dr. Johnson indicated he could not do anything more for Mr. Herrle. TR. 36, 49, 69. Mr. Herrle testified that his knee was also evaluated by Dr. Robert Tiel, a neurologist, but that he did not know the results of Dr. Tiel's evaluation. TR. 46-47. Mr. Herrle testified that he has not had any medications for his injury since his release by

Dr. Johnson. TR. 36, 49. Mr. Herrle testified that Dr. Johnson refused to prescribe any more medicine to him because Dr. Johnson would no longer be treating him. TR. 70-71.

In addition to his knee condition, Mr. Herrle has had complaints of back pain dating as far back as February 1996. TR. 41-42. Mr. Herrle believed that the pain in his back results from his leg pain and the way he walks. TR. 56. Mr. Herrle testified that Dr. Johnson secured approval for three steroid treatments for his back and that his back pain was eased after the first treatment. TR. 43. Nevertheless, Mr. Herrle testified that Avondale rescinded approval of the next two treatments. TR. 43-44. Mr. Herrle added that his knee pain was not relieved by the steroid treatment. TR. 44.

Mr. Herrle also testified that he sought treatment for his back through his own private health plan, *Ochsner 65*. TR. 55-56. Through *Ochsner 65*, Mr. Herrle was treated by Dr. Mark Meyer, who administered Novocain and cortisone treatments to his back. TR. 56. According to Mr. Herrle, Dr. Meyer indicated that Mr. Herrle had tendinitis in his back and that “it probably could” be coming from his knee. TR. 56. Mr. Herrle testified that he also saw Dr. Lawrence Russo regarding his back pain, on referral from Avondale. TR. 56.

Mr. Herrle testified that he is still in pain and that he has not been able to see a doctor or procure pain medicine since his release by Dr. Johnson. TR. 47. Mr. Herrle testified that he submitted two requests to Avondale to see an alternate doctor, Dr. Warren Bourgeois. TR. 47. Mr. Herrle also testified that he petitioned the Department of Labor and that the Department of Labor indicated he had the right to seek another doctor. TR. 48.³ Despite his attempts however, Avondale has refused authorization of any treatment for Mr. Herrle’s knee or back since 2001. TR. 49. When asked if he has attempted to see Dr. Johnson since 2001, Mr. Herrle testified that he felt there was no reason for him to contact Avondale about seeing Dr. Johnson after Dr. Johnson had told him not to come back. TR. 70.

Mr. Herrle testified that following his first knee replacement surgery, Dr. Johnson had indicated that he could return to work TR. 60. As a result, Mr. Herrle in 1995 met with Nancy Favaloro, a vocational specialist. TR. 26. Although he never felt like he had a good result from his first knee replacement surgery and he was always in pain, Mr. Herrle cooperated with Ms. Favaloro. TR. 25-26. Mr. Herrle testified that he was interested in returning to work at that time and that he went to about 40 different employers seeking employment. TR. 27-29. Mr. Herrle testified that he went to all the leads provided by Ms. Favaloro and that he got a card or letter from each of those employers. TR. 30. Despite his

³ Mr. Herrle’s testimony is supported by a May 9, 2002 document from the United States Department of Labor which summarizes Mr. Herrle’s situation with Dr. Johnson and recommends that Avondale authorize Mr. Herrle’s request to see Dr. Bourgeois or another new physician. CX-8, p. 1.

efforts, Mr. Herrle did not get any offers of employment. TR. 30. Mr. Herrle testified that he has not heard from Ms. Favaloro since 1997. TR. 52.

Mr. Herrle testified that although he had physical problems while looking for work, he continued his job search because he felt he needed to find employment. TR. 32-33. Mr. Herrle testified that he sought about 6 jobs independently, based on classified ads in the Times-Picayune. TR. 33. Mr. Herrle testified that one of those jobs was with Hill Behan, a job that he could not perform because it required lifting of 50 pounds. TR. 33. He also testified that he contacted David Duhon, the head of Avondale's workers' compensation department, to inquire about employment in Avondale's return to work program. TR. 34. According to Mr. Herrle, Mr. Duhon said nothing was available but that he would investigate further. TR. 34. Mr. Herrle testified that he has not since heard from Mr. Duhon. TR. 34.

Mr. Herrle testified that he also worked with Deby Bailey, a vocational rehabilitation specialist referred by the Department of Labor. TR. 34. Mr. Herrle testified that under Ms. Bailey's direction, he checked employment listings each week at the Jefferson Parish employment building and the State employment building. TR. 35. Mr. Herrle testified that there was nothing available he felt he could do given Dr. Johnson's restriction of sedentary employment. TR. 35.

Mr. Herrle testified that Dr. Johnson indicated he could again return to work after his second knee replacement surgery in July 1996. TR. 35, 63-64. Despite that fact, Mr. Herrle testified that his job search took place mostly in 1995 and 1996 and that he stopped looking for employment by 1998. TR. 74, 75. He testified that he pursued all the leads sent by Ms. Favaloro. TR. 74.

Mr. Herrle testified that when he met with Ms. Favaloro in 1995, he planned to return to Avondale and retire normally in 1998. TR. 66. However, his plan changed after he was unable to return to Avondale due to his injury. TR. 75-76. Mr. Herrle testified that retirement was not the reason he stopped looking for employment. TR. 75. Instead, he has stopped looking for employment because of his pain. TR. 54, 75. Although Mr. Herrle wanted to return to work, he did not believe he could presently handle even sedentary employment. TR. 30, 34, 76-77.

Mr. Herrle testified that he drives very seldom because of pain in his leg, hip, and back. TR. 36, 44. Mr. Herrle testified that stepping on the gas and brake pedals applies pressure to his knee and back, causing pain. TR. 36, 38. Mr. Herrle testified that he drives only occasionally to a nearby grocery store when his wife is unavailable. TR. 37. Mr. Herrle testified that he did not believe he could drive back and forth everyday to work because of his pain. TR. 37. Mr. Herrle testified that his wife drove him to all of the employers he visited during his job search. TR. 37, 63.

Mr. Herrle testified that his knee pain persisted despite all three of his surgeries and that his pain became worse than when he was first operated on. TR. 24-25, 35, 54. Mr. Herrle testified that his knee swells all the time. TR. 38. Mr. Herrle lifted up his pant leg and showed the Court that his knee was swollen even while he was testifying. TR. 38. According to Mr. Herrle, there is nothing he can do to manage the swelling. TR. 38. Mr. Herrle also testified that he has pain in his hip and back. TR. 44. Mr. Herrle testified that he takes Tylenol and Tylenol PM for the pain but that it does not bring him much relief. TR. 49.

Mr. Herrle testified that he does not do much at home. TR. 38. According to Mr. Herrle, he cannot just sit at home all the time because it causes him pain. TR. 40. Mr. Herrle testified that he uses a recliner but that it relieves only pressure on his back. TR. 40. Mr. Herrle testified that following his last surgery, he gets up in the morning, eats his breakfast, feeds his chickens, and cuts his grass in the summertime. TR. 65. He testified that he wears a back support while cutting the grass and that it takes him three days to cut his 25 x 52 foot yard. TR. 39, 65-66. Mr. Herrle testified that he usually mows for about an hour and a half a day and that he uses a walk-behind mower. TR. 65-66.

Mr. Herrle also testified that he has a 37% hearing impairment. TR. 49-50. Mr. Herrle testified that the assessment of 37% is based on opinions by his personal doctor as well as a doctor from Avondale. TR. 49-50. Mr. Herrle testified that his wife usually answers the phone and that he does not use the phone much because he has a hard time listening. TR. 50. Mr. Herrle testified that he did not believe he could perform a job that requires the use of a phone on a regular basis, including the dispatcher jobs to which he was referred. TR. 51. Mr. Herrle testified that he was provided a hearing aid by Avondale but that he had problems with it and it did not work properly with a phone. TR. 51.

Marietta Herrle

Mrs. Herrle has been married to Mr. Herrle for 51 years. TR. 78-79. She is not employed. TR. 86. According to Mrs. Herrle, Mr. Herrle complains about his knee and back pain every day. TR. 82. Mrs. Herrle testified that Mr. Herrle has taken Tylenol but that it does not bring him much relief. TR. 90. She testified that she and Mr. Herrle do not do much and that their whole lives have been consumed by his injury. TR. 104. Mrs. Herrle testified that Mr. Herrle goes outside, stays in the yard, and cuts the grass in the summer. TR. 90. Mrs. Herrle testified that other than cutting the grass, Mr. Herrle does not help her much around the house. TR. 102. According to Mrs. Herrle, Mr. Herrle drives very little because of his knee and back pains. TR. 82. Mrs. Herrle testified that Mr. Herrle will occasionally drive, in distances less than a mile, but that she otherwise does all of the driving. TR. 101-02.

Mrs. Herrle testified that she went with her husband to all his doctors' visits and that she spoke to his doctors. TR. 82, 97. According to Mrs. Herrle, Dr. Johnson told Mr. Herrle that there was nothing more he could do for Mr. Herrle. TR. 92, 98. Mrs. Herrle testified that when she and Mr. Herrle thereafter tried to make appointments with Dr. Johnson, they were told by Dr. Johnson's office that Avondale would not approve appointments for Mr. Herrle. TR. 98-99. Mrs. Herrle testified that she called Avondale and spoke with Debbie Hebert many times regarding Avondale's refusal to approve Mr. Herrle's visits with Dr. Johnson. TR. 97, 100. She testified that she was told by Ms. Hebert that Avondale had done all it would do. TR. 100.

Mrs. Herrle testified that she and Mr. Herrle also tried to get an appointment with Dr. Warren Bourgeois, an orthopedic physician who had treated Mrs. Herrle's parents. TR. 93-94. According to Mrs. Herrle, they were unable to make an appointment with Dr. Bourgeois because Mr. Herrle was under workers' compensation and Avondale would not authorize treatment by Dr. Bourgeois. TR. 94.

Mrs. Herrle testified that Mr. Herrle was approved for three epidural treatments for his back. TR. 91. According to Mrs. Herrle, Mr. Herrle received some initial relief after his first treatment. TR. 91. However, Avondale rescinded its approval of the remaining treatments. TR. 91.

Mrs. Herrle testified that she drove Mr. Herrle to about 40 employers all around the New Orleans area. TR. 82-83, 96. However, Mr. Herrle never received a job offer. TR. 83. Mrs. Herrle testified that Mr. Herrle put in applications at each of the places she took him and that he had cards or letters from every place they went. TR. 84. She testified that the job search was based on ads in the newspaper and included visits to Hill Behan, Winn-Dixie, and Wal-Mart. TR. 96-97. Mrs. Herrle also testified that Mr. Herrle attempted to get a job in Avondale's return to work program. TR. 86.

Mrs. Herrle was unsure when Mr. Herrle stopped looking for employment, but she testified that his job appointments were mostly before his second knee replacement surgery. TR. 87-88, 95. She testified that she and Mr. Herrle did go to some employers after his second knee replacement, just not as many as prior to it. TR. 95. According to Mrs. Herrle, they probably searched for jobs in 1998, but Mrs. Herrle was unsure whether they looked for jobs after 1998. TR. 95. Mrs. Herrle testified that Mr. Herrle stopped looking for jobs because he did not receive any more leads from Ms. Favaloro and Ms. Bailey. TR. 88. She explained that she and Mr. Herrle thought they were supposed receive leads from these ladies, in conjunction with Mr. Herrle's independent job search. TR. 88.

Mrs. Herrle testified that Mr. Herrle applied for dispatcher jobs. TR. 85. Mrs. Herrle opined that Mr. Herrle could not perform such a job because he does not hear well. TR. 85. She testified that he has had a hearing loss for 10 or 11 years. TR. 85. Mrs. Herrle testified

that Mr. Herrle has a hearing aid from Avondale but that he does not wear it because it causes a roaring in Mr. Herrle's ear and does not work well. TR. 86, 102-03. She testified that Mr. Herrle does not wear his hearing aid and that he only speaks on the phone occasionally. TR. 102.

Although Mrs. Herrle was not sure whether she would like Mr. Herrle to return to work in light of his age, Mrs. Herrle testified that Mr. Herrle has never been deferred from his responsibilities. TR. 104. Mrs. Herrle would have liked Mr. Herrle to have retired at age 65 with Avondale, after reaching his cutoff date for work and achieving his retirement accolades. TR. 105. However, Mrs. Herrle explained that Mr. Herrle has been barred from retirement in that way because of his injury. TR. 105. Mrs. Herrle testified that Mr. Herrle wanted to return to work badly after he was injured and that he could return to work if his knee were not problematic. TR. 86, 107. Mrs. Herrle testified that Mr. Herrle has always been a conscientious worker and has always lived up to his responsibilities. TR. 87. According to Mrs. Herrle however, Mr. Herrle is not capable of working a full-time job because he lives with pain continually, cannot meet standing or sitting requirements for that long, and has a transportation problem. TR. 89.

II. MEDICAL EVIDENCE

1. Testimony and Reports

Charles L. Johnson, M.D.

Dr. Johnson is a specialist in orthopedics. RX-22, p. 6. He is board certified and licensed to practice in Louisiana and Texas. RX-22, p. 6. Dr. Johnson testified that he first evaluated George Herrle on July 20, 1993 as a workers' compensation referral from Avondale. RX-22, p. 7; CX-3, p. 111. Dr. Johnson indicated that Mr. Herrle twisted his knee while walking on the deck of a ship at Avondale. RX-22, pp. 7-8; CX-3, p. 111. Dr. Johnson opined that Mr. Herrle probably suffered some chondral damage to either the medial femoral condyle or the undersurface of his patella. RX-22, p. 9; CX-3, p. 111. Dr. Johnson indicated that Mr. Herrle could not return to work at his regular occupation and that Mr. Herrle could ultimately be a candidate for arthroscopic debridement. RX-22, p. 9; CX-3, p. 111. Dr. Johnson noted that Mr. Herrle had mild arthritis equal in both knees. RX-22, p. 9. However, Dr. Johnson did not think this arthritis was the cause of Mr. Herrle's right knee condition. RX-22, p. 9.

Dr. Johnson performed an arthroscopy on Mr. Herrle's right knee on September 17, 1993. RX-22, p. 10; CX-3, p. 102. Dr. Johnson testified that Mr. Herrle complained of weakness and pain in his knee after the surgery. RX-22, p. 12. Dr. Johnson testified that Mr. Herrle's pain at that time was based on progression of his arthritis. RX-22, pp. 12-13.

Mr. Herrle's condition continued to degenerate, and Dr. Johnson eventually performed a second surgery on Mr. Herrle's knee. RX-22, p. 14.

On August 10, 1994, Dr. Johnson performed total knee replacement surgery on Mr. Herrle. RX-22, pp. 14-15; CX-3, p. 84. Dr. Johnson testified that after the 1994 total knee replacement surgery, Mr. Herrle's progress went well, with complaints of pain that were not unusual. RX-22, pp. 16-17.

In a March 20, 1995 report, Dr. Johnson indicated that Mr. Herrle was capable of sedentary work. CX-3, p. 69. According to that report, Mr. Herrle could not carry anything greater than 10 pounds and would not be able to walk more than one hour per day. CX-3, p. 69.

In a August 21, 1995 report, Dr. Johnson indicated that Mr. Herrle continued to have pain complaints about his knee. CX-3, p. 61. Dr. Johnson recommended that Avondale obtain a second opinion to try to determine why Mr. Herrle continued to have so much pain. CX-3, p. 61.

On September 28, 1995 and October 10, 1995, Dr. Johnson indicated that Mr. Herrle had a 30% permanent partial impairment to his right leg in accordance with AMA guidelines. CX-3, pp. 58-59.

Dr. Johnson testified that because of continued pain, Mr. Herrle had revision knee replacement surgery on July 8, 1996. RX-22, p. 17; CX-3, p. 51. Dr. Johnson testified that Mr. Herrle's complaints of pain had become intense and that Mr. Herrle complained of hypersensitivity. RX-22, p. 17-18. Dr. Johnson was concerned that Mr. Herrle's bone did not properly adjust to the first knee replacement. RX-22, p. 17. In a July 8, 1996 operative report, Dr. Johnson indicated that pre-operatively Mr. Herrle had a "failed total knee on the right with loosening of femoral component." CX-3, p. 51. Dr. Johnson testified that Mr. Herrle was the only case of total joint replacement that he has had to revisit. RX-22, p. 19.

Dr. Johnson testified that Mr. Herrle began to complain of pain after the revision surgery in October 1996 and that Dr. Johnson did not know the cause of the pain. RX-22, p. 21. In a September 17, 1997 report, Dr. Johnson indicated that he would like to get approval from Avondale to determine how much of Mr. Herrle's pain was secondary to the knee replacement itself. CX-3, p. 22.

Dr. Johnson also indicated that Mr. Herrle complained of back pain in February 1996. RX-22, p. 18; CX-3, p. 54. According to Dr. Johnson, Mr. Herrle at that time reported walking with an antalgic gait. RX-22, p. 18; CX-3, p. 54. Dr. Johnson testified that Mr. Herrle continued to complain of pain through 1997, and Dr. Johnson suggested an epidural steroid injection for Mr. Herrle's lumbar spine. RX-22, pp. 21-22; CX-3, p. 22. Dr. Johnson

testified that Mr. Herrle received an epidural steroid injection in October 1997, which gave Mr. Herrle excellent relief of pain. RX-22, p. 23.⁴ However, Dr. Johnson indicated that workers' compensation would not thereafter approve any treatment for Mr. Herrle's back, and Dr. Johnson suggested Mr. Herrle get evaluated for his back pain under Mr. Herrle's private health plan. RX-22, p. 23; CX-3, p. 17.

Dr. Johnson testified that he did not doubt Mr. Herrle had back pain. RX-22, pp. 32-33. Dr. Johnson also indicated that it was his opinion that Mr. Herrle's antalgic gait caused his low back pain. CX-3, p. 17; RX-22, pp. 20, 31-33. Dr. Johnson testified that he agreed with Dr. Lawrence Russo's determination that Mr. Herrle's back pain may stem from a pre-existing back condition that was aggravated due to Mr. Herrle's antalgic gait. RX-22, pp. 45-46.

Dr. Johnson suggested pain management on several occasions during the course of his treatment of Mr. Herrle. In a May 28, 1998 report, Dr. Johnson indicated that Mr. Herrle continued to have pain complaints and that Avondale should consider sending Mr. Herrle to a pain management department as more orthopedic surgery would not be helpful. RX-22, pp. 23-24; CX-3, p. 15. Dr. Johnson also discussed pain management in November 1998, indicating that he had not received a response from Avondale regarding his May 1998 suggestion of pain management and that he had requested Mr. Herrle independently go on a pain management evaluation. RX-22, p. 24; CX-3, pp. 12-13. In addition, Dr. Johnson at his deposition recommended an exploration into pain management for Mr. Herrle. RX-22, pp. 39, 51.

By January 1999, Dr. Johnson testified that he did not know why Mr. Herrle continued to have so much pain in his knee and that he did not believe he could do anything more for Mr. Herrle other than offer pain medication and periodic return visits. RX-22, p. 25. In a June 17, 1999 report, Dr. Johnson noted that Mr. Herrle complained of back pain and indicated that his back problem had not been investigated very thoroughly. CX-3, p. 8. Dr. Johnson explained that Mr. Herrle's back problem would best be evaluated by a true back specialist. CX-3, p. 8.

In a June 28, 1999 report, Dr. Johnson outlined Mr. Herrle's work restrictions. CX-3, p. 9. Dr. Johnson indicated that Mr. Herrle was capable of sitting continuously, walking for three hours, lifting and standing for two hours, and was not at all capable of bending, squatting, climbing, kneeling, or twisting. CX-3, p. 9. Dr. Johnson indicated that Mr. Herrle could lift up to 10-20 pounds, had no hand restrictions, and was capable of simple grasping, pushing and pulling, fine manipulation, and reaching/working above the shoulder. CX-3, p. 9. According to Dr. Johnson, Mr. Herrle was incapable of employment that required using his feet in repetitive movements, operating foot controls, or operating a motor vehicle. CX-3,

⁴ Page 23 of RX-22 is incorrectly labeled in evidence as "Page 21."

p. 9. Dr. Johnson indicated that Mr. Herrle had no cardiac, visual, or hearing limitations. CX-3, p. 9. Mr. Herrle also was not restricted in regard to temperature, high speed, and dust, fumes, or gases. CX-3, p. 9. Mr. Herrle had no restrictions regarding interpersonal relationships, and Dr. Johnson indicated that Mr. Herrle was capable of working eight hours a day. CX-3, p. 9. Dr. Johnson also noted that Mr. Herrle would need vocational rehabilitation services. CX-3, p. 9.

Dr. Johnson testified that he had not made a specific determination regarding Mr. Herrle's ability to drive. RX-22, p. 49. However, Dr. Johnson found it hard to believe that Mr. Herrle had difficulty driving. RX-22, p. 49. Dr. Johnson also testified that he did not know whether Mr. Herrle could have so much pain that Mr. Herrle was incapable of working, explaining that he has never treated any other patient with comparable levels of pain during his 24 years of performing total knee replacement surgeries. RX-22, p. 48. Dr. Johnson testified that he would not assign any work limitations based on Mr. Herrle's back condition because he had not treated Mr. Herrle's back. RX-22, p. 46. Dr. Johnson testified that he physically examined Mr. Herrle for his back pain but that he never made a diagnosis, explaining that he is not an expert on backs. RX-22, pp. 29, 34.

In October 1999, Mr. Herrle continued to have the same complaints he had for years. RX-22, p. 26; CX-3, p. 6. Dr. Johnson suggested that Mr. Herrle submit to Avondale a request for evaluation of his back. RX-22, p. 26; CX-3, p. 6. In a May 4, 2000 report, Dr. Johnson indicated that Mr. Herrle continued to have the same complaints about his knee, but that he had done as much for Mr. Herrle's right knee as possible. CX-3, p. 6.

In August 2000, Dr. Johnson referred Mr. Herrle to Dr. Hugh Fleming to test for a nerve problem using electrical studies. RX-22, p. 26; CX-3, p. 5. After tests revealed some slowing of the peroneal nerve around the fibula head, Dr. Johnson suggested Mr. Herrle be evaluated by the LSU Neurosurgical Department, which specializes in nerve entrapments. RX-22, p. 26; CX-3, p. 5.

On January 2, 2001, Dr. Johnson indicated that he believed Mr. Herrle had a peripheral entrapment of his peroneal nerve, and Dr. Johnson reiterated his recommendation that Mr. Herrle undergo an evaluation by the LSU Department of Neurosurgery. CX-3, p. 2. Dr. Johnson also indicated that Mr. Herrle continued to call his office and was very upset after he was told that Dr. Johnson no longer considered himself Mr. Herrle's treating physician. CX-3, p. 2.

On March 13, 2001, Dr. Johnson indicated that Mr. Herrle was discharged from his care, as he had nothing else to offer Mr. Herrle. RX-22, p. 27; CX-3, p. 1. Dr. Johnson testified that during that visit Mr. Herrle reported being evaluated Dr. Tiel at LSU. RX-22, pp. 26-27; CX-3, p. 1. According to Dr. Johnson, Mr. Herrle indicated that Dr. Tiel said there was nothing he could do for Mr. Herrle. RX-22, pp. 26-27. Dr. Johnson also indicated

that he was not willing to continue giving Mr. Herrle pain medication. RX-22, p. 27; CX-3, p. 1.

Dr. Johnson testified that he examined Mr. Herrle during his visits after the revision surgery and that there were no objective findings for pain. RX-22, pp. 27-28. However, Dr. Johnson believed that Mr. Herrle was in pain, dating back to the time of the revision surgery. RX-22, pp. 27-28. Dr. Johnson opined that Mr. Herrle's knee impairment rating remains 30%, the same rating Dr. Johnson had assigned in 1995 before Mr. Herrle's revision surgery. RX-22, pp. 43-44; CX-3, pp. 58-59. Dr. Johnson added that he is not able to assign an impairment rating for any additional knee pain that arises from Mr. Herrle's back condition. RX-22, pp. 44-45. Dr. Johnson opined that Mr. Herrle reached maximum medical improvement in July 1997, one a year after his revision surgery. RX-22, pp. 30, 43.

Robert L. Tiel

Dr. Tiel testified that he is board certified and specializes in neurosurgery. RX-20, p. 6. He is licensed to practice in Louisiana. RX-20, p. 6. Dr. Tiel examined Mr. Herrle on February 19, 2001, upon referral by Dr. Johnson for evaluation of Mr. Herrle's knee regarding a possible peroneal nerve entrapment. RX-20, pp. 8-10; CX-4, p. 1. Based on his evaluation, Dr. Tiel opined that Mr. Herrle did not have an entrapment of the nerve. RX-20, p. 12. At Dr. Tiel's direction, an EMG was performed on Mr. Herrle by Dr. Austin Sumner. CX-4, p. 1. The EMG results indicated normal right sural, saphenous, and superficial peroneal sensory studies, and normal right tibial and peroneal motor studies. CX-4, p. 1. Dr. Tiel testified that the EMG also showed some evidence of mild peroneal neuropathy. RX-20, p. 12; CX-4, pp. 1-2. However, Dr. Tiel was not sure there was any evidence of an actual nerve problem, and in Dr. Tiel's opinion, there did not seem to be any recent or ongoing injury to the nerve. RX-20, pp. 12, 15; CX-4, pp. 1-2. Dr. Tiel explained that although the EMG results were interpreted by Dr. Sumner as containing evidence of a peroneal neuropathy, the evidence was probably related to muscle manipulation at the time of the joint insertion. CX-4, pp. 1-2.

With respect to causation of Mr. Herrle's knee pain, Dr. Tiel testified that he did not know where the pain was coming from. RX-20, p. 18. Dr. Tiel testified that he could not localize the problem and therefore could not sufficiently identify any nerve related problem such that he would recommend surgery. RX-20, pp. 13, 18-20, 22-23, 31. Dr. Tiel reported that on failure to localize Mr. Herrle's knee pain and block it, he did not think he had anything to offer Mr. Herrle. CX-4, p. 2. Dr. Tiel advised that Mr. Herrle will have to live with the pain, but also indicated that medication may have a beneficial effect on Mr. Herrle and that it would be beneficial for Mr. Herrle to have a treating physician who might continue to explore medications. RX-20, p. 22, 32.

Dr. Tiel indicated that Mr. Herrle was administered saline in his leg, which was not intended to have an effect on the pain. CX-4, p. 1; RX-20, p. 16. Mr. Herrle was also given a 2% Lidocaine treatment, which is supposed to numb the skin over the area of sensitivity but also does not relieve the pain. CX-4, p. 1; RX-20, pp. 16-17. Given that Mr. Herrle properly did not have a response to these treatments, Dr. Tiel opined that Mr. Herrle was not faking his pain. RX-20, pp. 16-17; CX-4, p. 1. Although Dr. Tiel declined to give an opinion as to whether Mr. Herrle's pain was disabling, Dr. Tiel testified that Mr. Herrle's pain was chronic and that he assumed Mr. Herrle's pain was severe because it had warranted a trip to the doctor. RX-20, pp. 17-18, 29.

Dr. Tiel also testified that Mr. Herrle had reported back pain. RX-20, p. 25. However, Dr. Tiel did not focus on the back pain, explaining that for referrals he focuses on the problem that he was asked to evaluate and does not go into an area that is not his expertise. RX-20, p. 25. Dr. Tiel testified that it would not be inconsistent with Mr. Herrle's leg pain for him to have some degree of back pain. RX-20, p. 29. Dr. Tiel explained that people who have pain in one area may compensate, causing pain to begin in another area. RX-20, p. 29.

2. Reports

Mark Juneau, Jr., M.D.

Dr. Juneau first evaluated Mr. Herrle on August 11, 1993, at which time Dr. Juneau opined that Mr. Herrle had some early degenerative changes in the knee with a loose body. RX-10, p. 1. Dr. Juneau indicated that the condition was chronic, and Dr. Juneau thought Mr. Herrle may have caused damage to the articular surface of his joint with a twisting type of injury. RX-10, p. 1. Dr. Juneau further opined that Mr. Herrle may also have a degenerative tear to the medial meniscus or a tear to a degenerative medial meniscus. RX-10, p. 1. Dr. Juneau indicated that Mr. Herrle could work light duty, without squatting or climbing. RX-10, p. 1. Dr. Juneau thought an arthroscopic examination of the knee could quickly rid Mr. Herrle of his problems so he could return to work. RX-10, p. 2.

Dr. Juneau saw Mr. Herrle again on February 1, 1995, at the request of Avondale, to evaluate Mr. Herrle's total knee replacement surgery. RX-10, p. 3. Dr. Juneau indicated that Mr. Herrle was 5 months post total knee replacement, and Dr. Juneau determined that, despite Mr. Herrle's complaints of pain, Mr. Herrle had a very good result and found no objective evidence of effusion, loosening, or reason for discomfort. RX-10, p. 3. Dr. Juneau opined that Mr. Herrle could work light duty status, but should not be involved in heavy labor, climbing, or repeated bending or stooping. RX-10, p. 3. Dr. Juneau indicated that Mr. Herrle also should not be involved in carrying objects greater than 50 pounds nor walking in elevated areas where he could fall and injure himself. RX-10, p. 3.

Joseph Crapanzano, Jr. M.D.

On October 3, 1997, Dr. Crapanzano evaluated Mr. Herrle on referral by Dr. Johnson. CX-7, p. 1. Dr. Crapanzano determined that Mr. Herrle had diffuse, nonspecific back pain with no radicular symptoms. CX-7, p. 2. Dr. Crapanzano indicated that Mr. Herrle's back pain was a general muscle soreness across the lower back. CX-7, p. 2. Dr. Crapanzano gave Mr. Herrle an epidural steroid injection that went without difficulty. CX-7, p. 2.

Mark S. Meyer, M.D.

Dr. Meyer evaluated Mr. Herrle at the Ochsner Clinic. CX-6. In a December 8, 1997 report, Dr. Meyer indicated that he thought Mr. Herrle had a mild IT band tendonitis. CX-6, pp. 1-2. Dr. Meyer was hopeful that Mr. Herrle's pain would calm down on its own with reduced activity, but noted that physical therapy modalities may be required to try to calm down Mr. Herrle's symptoms. CX-6, p. 2.

On January 19, 1998, Dr. Meyer indicated that Mr. Herrle was given an injection near his knee of Celestone, Lidocaine, and Marcaine, after which Mr. Herrle had a reduction in his symptoms. CX-6, p. 3.

On April 1, 1998, Dr. Meyer evaluated Mr. Herrle again. CX-6, p. 3. According to Dr. Meyer's records, Mr. Herrle reported that his lateral knee pain returned after two weeks of good relief following the first injection. CX-6, p. 3. Dr. Meyer again indicated that he thought Mr. Herrle had a tendonitis problem, and Mr. Herrle was given a second injection which provided him good relief. CX-6, pp. 3-4.

Lawrence J. Russo, M.D.

Dr. Russo examined Mr. Herrle's lumbar spine on March 16, 1998. CX-5, p. 1. Dr. Russo found that Mr. Herrle had pre-existing osteoarthritis in the lumbar spine that was not symptomatic at the time of Mr. Herrle's first knee surgery. CX-5, p. 2. Dr. Russo indicated that having a total knee replacement or having some type of antalgic gait with a normal lumbar spine should cause little problems. CX-5, p. 2. However, given Mr. Herrle's advanced degeneration, Dr. Russo opined that it was conceivable a total knee replacement surgery could cause subclinical problems to become clinically significant. CX-5, p. 2. Dr. Russo allocated 90% of Mr. Herrle's complaints about his lumbar spine to the pre-existing degenerative disc disease and 10% to aggravation that his knee injury and subsequent surgeries may have caused. CX-5, p. 2. Dr. Russo indicated that Mr. Herrle's amount of lumbar spine osteoarthritis would have eventually caused him problems regardless of any problems with his knee. CX-5, p. 2.

Ralph P. Katz, M.D.

In a September 6, 2000 report, Dr. Katz indicated that he evaluated Mr. Herrle for his right knee and leg pain upon a referral by Avondale. RX-6, p. 1. Dr. Katz determined that Mr. Herrle had a painful right knee, status post total knee replacement with a revision. RX-6, p. 3. Dr. Katz was concerned about infection, aseptic loosening, or a nerve entrapment. RX-6, pp. 3-4.

Jumar Applinario, M.D.

Upon referral by Dr. Katz, Dr. Applinario performed a nerve conduction study and EMG on Mr. Herrle's right lower extremity on October 5, 2000. RX-6, p. 5. Dr. Applinario determined that there was no evidence of peroneal nerve involvement across the right fibular head. RX-6, pp. 6-7. He also determined that there was no evidence of lumbosacral nerve roots abnormality, or radiculopathy. RX-6, pp. 6-7.

Austin J. Sumner, M.D.

Upon referral by Dr. Tiel, Dr. Sumner performed an EMG on Mr. Herrle on February 19, 2001. CX-4, p. 3. With respect to his findings, Dr. Sumner indicated: "Normal right sural, saphenous, and superficial peroneal sensory studies. Normal right tibial and peroneal motor studies with evidence of an accessory peroneal nerve. EMG demonstrated mild chronic partial denervation in the right TA, peroneus longus and EHL. EMG of remaining muscles was within normal limits." Dr. Sumner's impression was that the electrodiagnostic evidence suggested a mild right peroneal neuropathy at or below the knee. CX-4, p. 4.

III. VOCATIONAL EVIDENCE

1. Testimony and Reports

Nancy Favaloro

Ms. Favaloro first met with Mr. Herrle on August 15, 1995, by way of a referral from Debbie Hebert⁵ of Avondale. TR. 109-110; RX-17, p. 3. Ms. Favaloro indicated that Mr. Herrle was born on April 16, 1933, that he was married and his wife did not work outside of the home, that he did not report any military service, and that he had a valid regular Louisiana driver's license with no restrictions. TR. 111; RX-17, p. 3. Ms. Favaloro reported that Mr. Herrle did not graduate from high school but did receive his GED. TR. 111; RX-17, p. 3. Ms. Favaloro indicated that Mr. Herrle had been employed with Avondale for over 24 years and was working as a pipefitter at the time of his injury. TR. 111; RX-17,

⁵ Debbie Hebert was known at the time as Debbie Johns. TR. 109.

p. 4. Ms. Favaloro indicated that prior to Avondale, Mr. Herrle worked as a journeyman pipefitter and that he still holds his plumbing license. TR. 111; RX-17, p. 4. Mr. Herrle also told Ms. Favaloro that he had continuous swelling in his right knee and that it takes him three days to mow the lawn. TR. 112; RX-17, p. 4.

According to Ms. Favaloro, Dr. Johnson had indicated that Mr. Herrle could return to work, in which he could sit continuously and intermittently walk and stand up to one hour per work day. TR. 110; RX-17, p. 4. Ms. Favaloro also noted that Dr. Johnson indicated Mr. Herrle could lift up to 10 pounds, could use his hands, and should not drive or use his feet to operate a motor vehicle. TR. 110; RX-17, p. 4. Ms. Favaloro also reported that Dr. Juneau indicated that Mr. Herrle was capable of light duty work but should not lift more than 50 pounds and was restricted from climbing ladders and repeated bending and stooping. TR. 111; RX-17, p. 4. Ms. Favaloro reported that Mr. Herrle had a 37% hearing loss and that Mr. Herrle did not feel he could perform a job answering the telephone. TR. 111; RX-17, p. 4. However, Ms. Favaloro testified that Mr. Herrle also later indicated that dispatcher jobs were best suited for him. TR. 112.

Ms. Favaloro testified that at their meeting, she administered two verbal achievement tests and one mathematical achievement test. TR. 112; RX-17, p. 5. She testified that according to the results, Mr. Herrle could perform jobs requiring writing and reading at the tenth grade level. TR. 112; RX-17, p. 5. Ms. Favaloro testified that based on Mr. Herrle's work history, Mr. Herrle had demonstrated at least average aptitude and general intelligence, meaning he has transferable skills and is capable of learning new job tasks. TR. 113; RX-17, p. 5.

Ms. Favaloro testified that at the meeting, Mr. Herrle or his wife inquired about Avondale's return to work program ("RWRP"). TR. 113-14. Ms. Favaloro opined that Mr. Herrle was suited to the RWRP and testified that she made a referral for Mr. Herrle. TR. 113-14; RX-17, p. 5. Ms. Favaloro indicated that other compatible jobs for Mr. Herrle included tool repairer, bench worker, cashier, and dispatcher. RX-17, p. 5. Ms. Favaloro reported that those jobs typically paid between \$5.00 to 7.00 per hour. RX-17, pp. 5-6. Ms. Favaloro also noted that she received the impression that Mr. Herrle was not interested in going back to work and that he was concerned about his future social security retirement benefits. TR. 123-24; RX-17, p. 6. At the hearing, Ms. Favaloro testified that Mr. Herrle had told her he would apply to jobs, despite his fear of losing his retirement if he returned to employment. TR. 123-24.

After the initial visit with Mr. Herrle, Ms. Favaloro performed a labor market survey based on his evaluation. TR. 116. Ms. Favaloro testified that she used the lower lifting limit assigned by Dr. Johnson and that the jobs identified fell within Dr. Johnson's restrictions. TR. 118. She testified that an initial report was sent to Mr. Herrle on August 31, 1995 describing the types of jobs that were found and a follow-up letter was sent

on September 26, 1995. TR. 116-17. In the August 31, 1995 report, Ms. Favaloro identified six positions she opined were suitable for Mr. Herrle. RX-17, pp. 8-9. She identified three dispatcher positions. First, Ms. Favaloro identified a position with a company in Jefferson involving the dispatch of tow truck drivers to various locations, with training provided and pay ranging from \$5.50 to \$7.00 per hour. RX-17, p. 8. This position involved the use of a telephone, cellular phone, or two-way radio, and the position was sedentary with no lifting required. RX-17, p. 8. Ms. Favaloro indicated that the second dispatcher job was the same type of position as the first dispatcher job. RX-17, p. 8. The second dispatcher job was with a company in New Orleans, which provided job training and paid \$4.25 per hour. RX-17, p. 8. The third dispatcher job was also sedentary and paid \$4.25 per hour, with job training provided. RX-17, p. 8.

In her August 31, 1995 report, Ms. Favaloro also identified a parking lot cashier position in Kenner, which provided job training and paid \$5.50 per hour. RX-17, p. 9. This position was sedentary and required math skills to count money. RX-17, p. 9. Ms. Favaloro identified another parking lot cashier position with an employer in downtown New Orleans, paying \$4.75 per hour. RX-17, p. 9. The employer provided job training and math skills were required. RX-17, p. 9. The final position identified by Ms. Favaloro in the August 31, 1995 report was a customer service representative for a furniture company in New Orleans, paying \$5.00 per hour. RX-17, p. 9. The position was sedentary and required answering telephone calls from customers. RX-17, p. 9.

Ms. Favaloro testified that on October 26, 1995, Mr. Herrle was sent another letter, which contained the employers for jobs described in her November 2, 1995 report. TR. 117; RX-17, p. 13. In her November 2, 1995 report, Ms. Favaloro first identified a mail sorter position in which the worker would sort mail, label envelopes using a labeling machine, and fold letters. RX-17, p. 13. This position required basic reading and math skills, was considered light duty, and paid \$4.25 per hour. RX-17, p. 13. Lifting did not exceed 20 to 25 pounds, and the employee could alternate his sitting, standing, and walking positions. RX-17, p. 13.

Ms. Favaloro next identified a production worker position at a jewelry store, paying \$4.25 to \$5.00 per hour with on-the-job training provided. RX-17, p. 13. The worker would buff and sand metal pieces. RX-17, p. 13. The position was sedentary, with no heavy lifting or strenuous physical demands. RX-17, p. 13.

Ms. Favaloro also identified a monitor operator position, in which the worker would monitor residential and business alarm systems. RX-17, p. 14. The worker would be responsible for dispatching appropriate authorities. RX-17, p. 14. The position paid \$4.50 per hour during training and \$5.00 per hour to start, with training provided. RX-17, p. 14. The position required good communication skills, and light filing was involved. RX-17, p. 14. The position was sedentary, with no heavy lifting or strenuous physical demands.

involved and the worker being able to alternate between standing and walking as needed. RX-17, p. 14.

Ms. Favaloro identified a parking lot cashier position in which the worker would handle the cashier's booth, collect money, and give out tickets. RX-17, p. 14. Basic math skills were required to complete cash transactions, and the worker may occasionally have had to park a car. RX-17, p. 14. The position paid \$4.25 to \$5.00 per hour, and the worker was able to alternate between sitting, standing, and walking. RX-17, p. 14. There was frequent reaching and handling, but no lifting was involved in the position. RX-17, p. 14.

Ms. Favaloro identified a dental lab technician trainee position, described as mainly sedentary with the ability to alternate sitting, standing, and walking. RX-17, p. 14. The worker was to be trained to create and assemble molds and impressions for use as dentures. RX-17, p. 14. On-the-job training was provided, and the position paid \$5.00 to \$6.00 per hour with a potential to earn up to \$10.00 per hour. RX-17, p. 14.

Lastly, Ms. Favaloro identified a production worker position, described as sedentary with the worker being able to alternate between sitting, standing, and walking as needed. RX-17, p. 14. Occasional lifting was involved and the entry wage was \$4.25 per hour. RX-17, p. 14. The worker would be trained to operate a microfilm machine to photograph charts, medical records, legal papers, and other materials. RX-17, p. 14. The position required the passage of a chronological test before being hired. RX-17, p. 14.⁶

Also in her November 2, 1995 report, Ms. Favaloro noted that follow-ups were conducted with the positions she had previously identified on August 31, 1995. RX-17, p. 12. Ms. Favaloro testified that Mr. Herrle at that point had applied to only about half of the August 31, 1995 jobs. TR. 119. However, Ms. Favaloro also testified that Mr. Herrle may have applied to the jobs after she had contacted them for a follow-up. TR. 126-27.

In an April 12, 1996 report, Ms. Favaloro indicated that Mr. Herrle was continuing to apply for the positions identified for him. RX-17, p. 18. Ms. Favaloro indicated that she would be in touch with Avondale's RWRP program to determine whether they would be able to set up an interview for Mr. Herrle. RX-17, pp. 19, 23. She also identified more employment leads for Mr. Herrle. RX-17, p. 18. First, Ms. Favaloro identified a dental lab worker position for Selser Dental Lab, in which wages were above \$5.00 per hour. RX-17,

⁶ In her October 26, 1995 letter to Mr. Herrle, Ms. Favaloro identified the actual employers for the positions described in her November 2, 1995 report. RX-17, p. 16. The employers were: United Mail Services (mail sorter), Mignon Faget (bench worker), APS Alarm Protection Services (monitor operator), Dixie Parking (parking lot cashier), Guardsmark (gate guard), Pfisterer Auderer Dental Lab (dental lab technician trainee), and Southern Microfilm, Inc. (production worker). RX-17, p. 16.

pp. 18, 23. On-the-job training was provided, and a test for manual dexterity would be administered to applicants. RX-17, p. 18.

Second, Ms. Favaloro identified a production worker position with Spectrum Control Technology. RX-17, pp. 19, 23. The position paid about \$4.76 per hour for the manufacture of ceramic capacitors, and on-the-job training was provided. RX-17, pp. 19, 23. Lifting was under 20 pounds, and the worker was able to alternate between sitting, standing, and walking. RX-17, pp. 19, 23.

Third, Ms. Favaloro identified a production worker position at Southern Microfilm. RX-17, pp. 19, 23. On-the-job training was provided, and the position paid \$4.25 per hour. RX-17, pp. 19, 23. The position called for learning to do microfilming using a machine to photograph written documents. RX-17, pp. 19, 23. The work was repetitive and considered sedentary. RX-17, pp. 19, 23.

Fourth, Ms. Favaloro identified a check out position for Metal Graphics, described as sedentary. RX-17, pp. 19, 23. The position paid minimum wage and provided on-the-job training for someone who could read a ruler. RX-17, pp. 19, 23. The worker was to check label plates against drawings for errors. RX-17, pp. 19, 23.

Fifth, Ms. Favaloro identified a splicer/package clerk position for K & B, in which the worker would splice film and put finished photos into customer envelopes and packages. RX-17, pp. 19, 23. On-the-job training was provided, and the position paid \$5.50 to \$6.00 per hour to start and \$5.85 to \$6.35 per hour after 90 days. RX-17, pp. 19, 23. Lifting was under 10 pounds, and the worker was able to alternate between sitting and standing. RX-17, pp. 19, 23.

Sixth, Ms. Favaloro identified a dental lab technician trainee position for Pfisterer Auderer Dental Lab, described as a sedentary position with lifting not exceeding 10 pounds. RX-17, pp. 19, 23. The position paid \$5.00 to \$6.00 per hour, with on-the-job training provided in which the worker would learn to repair and make dental appliances. RX-17, p. 19.

Ms. Favaloro identified further positions in a February 27, 1996 report. First, Ms. Favaloro identified an airline security screener position with Huntly Corporation, in which workers would screen carry-on luggage at the New Orleans International Airport. RX-17, pp. 25, 28. The position paid \$4.25 per hour, and training was provided. RX-17, pp. 25, 28. The position was light duty with the ability to alternate positions during breaks and lunch. RX-17, pp. 25, 28. The position required frequent standing, but very little lifting, stooping, or bending. RX-17, pp. 25, 28. Passage of a background check and drug test were required. RX-17, pp. 25, 28.

Second, Ms. Favaloro identified a customer service representative position with Cox Cable, described as sedentary with the opportunity to stand and walk as needed. RX-17, pp. 25, 28. Entry wages were \$6.00 per hour, and the employee was to handle sales to customers and incoming telephone inquiries regarding billing, service problems, and troubleshooting. RX-17, pp. 25, 28.

Third, Ms. Favaloro identified a customer service worker position with Kirschman's, in which the employee would answer the phone and assist customers with problems regarding their merchandise and billing. RX-17, pp. 26, 28. The position was sedentary with entry wages of \$6.00 per hour. RX-17, pp. 26, 28. The position required very little lifting, and assistance would be provided when the occasional moving of files was necessary. RX-17, pp. 26, 28.

Fourth, Ms. Favaloro identified a customer service representative position with Budget Rent-A-Car. RX-17, pp. 26, 28. Entry wages were about \$5.75 per hour, and the position was sedentary with the ability to alternate between sitting, standing, and walking as needed. RX-17, pp. 26, 28. The employee was responsible for assisting customers with the rental and return process and promoting Budget products. RX-17, p. 26.

Fifth, Ms. Favaloro listed a dispatcher position with Moon's Wrecker Service, a position that was originally identified in her August 31, 1995 report. RX-17, pp. 26, 28. Ms. Favaloro indicated that Moon's Wrecker Service verified that it did not have an application on file for Mr. Herrle. RX-17, p. 26.

Sixth, Ms. Favaloro identified a dispatcher position with Holi Temporary Services, Inc., an industrial labor service company that fills job orders for customers. RX-17, pp. 26, 28. The employee was responsible for answering telephone calls and interviewing applicants. RX-17, pp. 26, 28. The position was sedentary, and the employee was able to alternate positions as needed. RX-17, pp. 26, 28. Entry level wages were \$8.12 per hour. RX-17, pp. 26, 28.

Seventh, Ms. Favaloro identified a dispatcher position with Security Van Lines, a household goods moving company. RX-17, pp. 26, 28. The employee was responsible for dispatching drivers and helpers for local and long distance moving projects, as well as processing service requests, inputting information in computers, ensuring that inspections are completed, and tracking pick up and delivery times. RX-17, pp. 26, 28. The position was sedentary, with no heavy or physical strenuous activity involved. RX-17, pp. 26, 28. The employee was able to alternate between sitting, standing, and walking as required, and entry level wages were \$27,500.00 per year. RX-17, pp. 26, 28.

Eighth, Ms. Favaloro identified a security guard position with Wells Fargo, a security guard agency that provides guards to various businesses. RX-17, pp. 27, 29. Specific job

tasks depended on the job site, but Ms. Favaloro indicated that none of the posts required heavy physical activity. RX-17, pp. 27, 29. Entry wages were \$4.25 per hour. RX-17, pp. 27, 29.

In a March 19, 1996 letter, Ms. Favaloro indicated that there were no openings with Avondale's RWRP Program. RX-17, p. 21.

On September 22, 1997, Ms. Favaloro did an update labor market study. TR. 120; RX-17, p. 30. She was provided with updated medical records from Dr. Johnson. TR. 120; RX-17, p. 30. She used the previously identified work restrictions of Dr. Johnson, indicating that Dr. Johnson's updated medical records did not address work restrictions. RX-17, p. 30. Ms. Favaloro testified that Mr. Herrle was not made aware of the leads from her September 22, 1997 report. TR. 120.

First, Ms. Favaloro identified a production worker position with Spectrum Control Technologies, a company that manufactures ceramic capacitors. TR. 120; RX-17, pp. 30-31. The opening rate was \$5.25 to \$5.50 per hour, and the worker was to use various small machinery in a production process. RX-17, pp. 30-31. On-the-job training was provided, and the worker was required to perform repetitive tasks, with occasional lifting of under 20 pounds. RX-17, p. 31. The worker was able to alternate between sitting, standing, and walking. RX-17, p. 31. Passage of a test regarding math and academic abilities was required. RX-17, p. 31.

Second, Ms. Favaloro identified an office building security officer position with Vinson Guard, in which the worker was responsible for maintaining order by enforcing building regulations. TR. 120; RX-17, p. 31. The worker would generally sit and perform 10 to 15 minute rounds, walking around a small area to detect and investigate disturbances and complaints. RX-17, p. 31. The worker was also responsible for completing reports. RX-17, p. 31. The position was unarmed, and the worker would not be asked to apprehend a perpetrator. RX-17, p. 31. The position paid \$5.15 to \$7.00 per hour. RX-17, p. 31.

Third, Ms. Favaloro identified a repair technician position with Industrial Welding Supply, paying \$6.00 to \$7.00 per hour. TR. 120; RX-17, p. 31. The worker would receive on-the-job training to work in the power tool department, where the worker would learn to repair power tools. RX-17, p. 31. The worker must have been able to read manuals and follow written instructions. RX-17, p. 31. Lifting was occasional and under 20 pounds, and a stool was provided to allow for sitting or standing to perform the tasks. RX-17, p. 31.

Fourth, Ms. Favaloro identified a parking cashier position at Hilton Hotel, in which no lifting was involved and wages began at \$5.15 per hour and increased to \$5.50 per hour after 6 months. TR. 120; RX-17, p. 31. The worker was required to accept payments for parking and to learn to use a computer system that computes the time and money owed. RX-

17, p. 31. The position provided on-the-job training, and an air conditioned booth was provided in which the worker may sit or stand. RX-17, p. 31.

Fifth, Ms. Favaloro again listed the Moon's Wrecker Service dispatcher position she had identified in two earlier reports. TR. 120; RX-17, p. 31.

Sixth, Ms. Favaloro identified a machine operator position for Intralux, in which the worker was to learn to operate various machines in the manufacture of plastic parts. TR. 120; RX-17, p. 32. The worker was also to inspect and package the small parts and would be given an aptitude test. RX-17, p. 32. The position involved occasional lifting of under 25 pounds and allowed for alternate sitting, standing, and walking. RX-17, p. 32. The wages were \$6.00 to \$6.50 per hour to start and \$8.00 to \$8.50 per hour after the training program was completed. RX-17, p. 32.

Ms. Favaloro conducted her most recent labor market study was on January 27, 2003, at which time Ms. Favaloro indicated that updated records of Dr. Tiel, Dr. Sumner, and Dr. Johnson, as well as the deposition of Mr. Herrle, was reviewed. TR. 122; RX-17(A), p. 1. Ms. Favaloro testified that Mr. Herrle's medical status had not really changed. TR. 123.

First, Ms. Favaloro identified a hand worker production position at Calancom, in which the worker would use his hands to cut threads and complete knots on canvas bags and totes. TR. 123; RX-17(A), p. 2. The job was mainly sedentary as the worker would be seated while working, and lifting was less than 10 pounds. RX-17(A), p. 2. On-the-job training was provided, and the position paid \$5.15 per hour. RX-17(A), p. 2.

Second, Ms. Favaloro identified an unarmed security guard position with Weiser Security, in which the worker was to provide security services for a business. TR. 123; RX-17(A), p. 2. Specific job duties depended on the post, but logging information and completing reports may have been necessary. RX-17(A), p. 2. The worker was to attend two eight hour training classes to obtain a state license, and there were posts that allowed for alternate sitting, standing, and walking. RX-17(A), p. 2. The wages averaged \$6.00 to \$7.00 per hour. RX-17(A), p. 2.

Third, Ms. Favaloro identified a booth cashier position for Central Parking, in which the worker was responsible for computing the time spent in the garage and collecting money. RX-17(A), p. 2. The job was mainly sedentary with allowance for alternate sitting, standing, and walking. RX-17(A), pp. 2-3. The worker was to be in a booth and may have occasionally been required to leave the booth and climb two flights of stairs to view license plates not visible by security cameras. RX-17(A), p. 2. On-the-job training was provided and wages were \$6.50 to \$7.25 per hour. RX-17(A), pp. 2-3.

Fourth, Ms. Favaloro identified a garage cashier position with the Royal Sonesta Hotel, in which the worker was to accept payments by cash and credit cards. TR. 123; RX-17(A), p. 3. The position provided on-the-job training, with wages of \$6.50 per hour. RX-17(A), p. 3. Lifting was less than 10 pounds, and the worker was to be seated most of the time but was able to stand at will. RX-17(A), p. 3.

Fifth, Ms. Favaloro identified a customer safety dispatcher position for Harrah's Casino, in which the worker would receive telephone calls from other departments related to customer service problems in the casino. TR. 123; RX-17(A), p. 3. The position required the use of a two-way radio, and the worker was responsible for documenting all calls received and dispatched. RX-17(A), p. 3. The worker was to remain seated generally but could also stand and walk. RX-17(A), p. 3. Lifting was up to 10 pounds, and the position paid \$8.17 to \$11.54 per hour. RX-17(A), p. 3.

Sixth, Ms. Favaloro identified a toll collector position at the Crescent City Connection, paying \$7.50 per hour. TR. 123; RX-17(A), p. 3. Basic math skills were required, and the worker would be trained to collect fees from cars, provide correct change, keep a cash balance, and record money collected each shift. RX-17(A), p. 3. The worker would also do occasional cleaning and sweeping inside his booth and must carry a cash drawer that weighs 20 to 30 pounds. RX-17(A), p. 3. The worker was able to alternate between sitting and standing inside the booth, and light reaching with an upper extremity was required. RX-17(A), p. 3.

Seventh, Ms. Favaloro identified an unarmed security guard position with Metro Security, for a high rise or medical building. TR. 123; RX-17(A), p. 3. The job required the completing of reports, and some posts required the watching of security cameras while others required having people sign in. RX-17(A), p. 3. In addition, some posts required mainly sitting while others required standing and patrols. RX-17(A), p. 3. The position paid \$5.15 to \$7.00 per hour, and the worker was responsible for attending training to receive a state license. RX-17(A), p. 3. The position allowed for walking around, and no heavy lifting was required. RX-17(A), p. 3.

At the hearing, Ms. Favaloro testified that she continuously found suitable alternate employment for Mr. Herrle from 1995 through 1997. TR. 119. She testified that based on Mr. Herrle's age, education, transferrable skills, medical restrictions, and labor market study, all the jobs in her reports were certainly within Mr. Herrle's skills and abilities. TR. 125. Ms. Favaloro testified that the employers she identified were told of Mr. Herrle's age and they all agreed to consider someone with Mr. Herrle's profile. TR. 125.

According to Ms. Favaloro, all the vocational rehabilitation activity with respect to Mr. Herrle occurred in 1995 and early 1996. TR. 124. Ms. Favaloro testified that the first time she made Mr. Herrle aware of any jobs was in September 1995 and that the last time

she notified him was April or March of 1996. TR. 125-26, 131. Ms. Favaloro testified that she did not send her 1997, 1999, nor 2003 reports to Mr. Herrle because she was asked by Avondale only to update her labor market surveys. TR. 124, 131-32. Ms. Favaloro testified that although she did not send Mr. Herrle the 1997-2003 job leads, Mr. Herrle would have been able to find most of these leads on his own through the newspaper, contacting employers, and through Job Service. TR. 140-41. With respect to Mr. Herrle's willingness to work, Ms. Favaloro testified that Mr. Herrle applied to most of the jobs she had asked him to and that she did not know beyond that whether Mr. Herrle had a willingness to return to work. TR. 124.

Ms. Favaloro testified that she did not find any jobs that would require driving all day because there were concerns about Mr. Herrle's ability to drive. TR. 127. Ms. Favaloro testified that if a person absolutely cannot drive, then there are other options to get to and from work, such as carpooling, public transportation, or being dropped off. TR. 128-29. Ms. Favaloro testified that she had not inquired about carpooling and that she did not know exactly what public transportation would be available to Mr. Herrle, how close Mr. Herrle could get to his workplace using public transportation, nor how long it would take him to get there. TR. 130. Ms. Favaloro conceded that if driving oneself is the only way for an employee to get to the workplace and the employee absolutely cannot drive, then the employee could not get to work. TR. 128-29.

Ms. Favaloro acknowledged that Dr. Johnson had suggested pain management for Mr. Herrle. TR. 134-35. Ms. Favaloro inferred that Dr. Johnson thought Mr. Herrle needed help coping with his pain, but she testified that Dr. Johnson's suggestion of pain management itself did not affect her vocational analysis. TR. 134-35. Instead, Ms. Favaloro testified that any change from a vocational standpoint would be dependent on the results of the pain management or any change in Mr. Herrle's work restrictions due to his pain. TR. 134-35. Ms. Favaloro testified that employment is probably precluded for someone whose pain is constant and severe, but that Mr. Herrle's records never indicated that he had so much pain that he was restricted from work. TR. 137, 140.

2. Reports

Deby Bailey

Ms. Bailey formulated a status report on November 13, 1995. RX-16. In an entry dated October 30, 1995, Ms. Bailey indicated that she met with Mr. Herrle for an initial vocational evaluation. RX-16, pp. 16-17. Ms. Bailey reported that Mr. Herrle had a valid regular driver's license and denied having any felony convictions. RX-16, p. 17. She indicated that Mr. Herrle reported a 37.5% hearing loss in both ears, that he had been unaccustomed to his hearing aids, and that he is not very good at talking or hearing on the phone. RX-16, p. 17. Ms. Bailey reported that Mr. Herrle had completed his GED in the

1960s and is able to read and write. RX-16, p. 18. Although she did no vocational testing herself, Ms. Bailey referenced the results of the tests administered by Ms. Favaloro. RX-16, p. 18. Ms. Bailey indicated that Mr. Herrle was employed at Avondale as a pipefitter at the time of his injury and that he had been a journeyman plumber prior to working at Avondale. RX-16, pp. 18-19.

Ms. Bailey indicated that Mr. Herrle wanted to return to work and that he was interested in an alternative position at Avondale. RX-16, p. 19. Ms. Bailey also indicated that Mr. Herrle reported contacting David Duhon regarding Avondale's RWRP but had not heard back from Mr. Duhon. RX-16, p. 19. Ms. Bailey indicated that compatible vocational alternatives for Mr. Herrle included a bench worker and dispatcher. RX-16, p. 20. According to Ms. Bailey, these jobs generally paid between \$5.00 and \$7.00 an hour. RX-16, p. 20.

Ms. Bailey formulated another status report on December 19, 1995. RX-16. In a November 15, 1995 entry, Ms. Bailey indicated that Mr. Herrle reported looking for jobs through the classified ads in the Times Picayune. RX-16, p. 10. According to Ms. Bailey, Mr. Herrle reported that he interviewed for an assistant manager position with Creative Management Concepts and that he had another interview for a management position. RX-16, p. 10. Ms. Bailey indicated that Mr. Herrle had not followed up with Avondale regarding the RWRP program. RX-16, pp. 10-11.

In a December 6, 1995 entry, Ms. Bailey indicated that Mr. Herrle reported submitting an application for Hill Behan but that he did not receive a follow-up phone call. RX-16, p. 12. Ms. Bailey recommended that Mr. Herrle register with the local job service office and that he review job announcements with Jefferson Parish. RX-16, p. 12. Mr. Herrle agreed to do so. RX-16, p. 12.

In a December 18, 1995 entry, Ms. Bailey indicated that she had contacted employers and identified open positions. RX-16, p. 13. She described a position with Swiss Security, in which on-the-job training was provided and entry wages were \$4.25 to \$4.75 per hour. RX-16, p. 13. Ms. Bailey indicated that qualifications for the job included passing a background check and the ability to read and write. RX-16, p. 13. According to Ms. Bailey, some gate guard positions allowed the employee to alternate between sitting and standing. RX-16, p. 13.

Ms. Bailey also contacted Vinson Guard Service. RX-16, p. 13. Qualifications for that job included passing a background check, passing a drug test, and the ability to read and write. RX-16, p. 13. On-the-job training was provided. RX-16, p. 13.

Ms. Bailey next described a position with Residential Security, which was primarily a driving security guard position. RX-16, p. 13. The qualifications included a clean police

record, basic reading skills, and a valid driver's license. RX-16, p. 13. No lifting or carrying was involved, and the entry wages were \$5.00 per hour. RX-16, p. 13.

Ms. Bailey identified a dispatcher position with Metro Security, which was sedentary and allowed for alternating positions during the day. RX-16, p. 13. The qualifications included a clean police record and the ability to read and write. RX-16, p. 13. On-the-job training was provided, and the position required occasional lifting and carrying of less than 5 pounds. RX-16, p. 13. Entry wages were \$5.00 per hour. RX-16, p. 14.

Ms. Bailey also located a dispatcher position with Moon Wrecker Service. RX-16, p. 14. The position required a basic knowledge of the Westbank, Metairie, and Kenner, the ability to read and write, and communication skills. RX-16, p. 14. The position was primarily sedentary, and entry level wages were \$4.25. RX-16, p. 14.

Lastly, Ms. Bailey identified a position with McCoy Dental Lab, which required standing all day and lifting of up to 50 pounds. RX-16, p. 14.

Ms. Bailey's next status report was on January 24, 1996. RX-16. In a December 22, 1995 entry, Ms. Bailey noted that Mr. Herrle had gone to the Jefferson Parish Personnel Office and the Employment Security Office but that nothing was available for him. RX-16, p. 6. According to Ms. Bailey, Mr. Herrle also applied for a toll collector position at the Crescent City Connection. RX-16, p. 6.

In a January 18, 1996 entry, Ms. Bailey noted that Mr. Herrle had called some leads from the Times Picayune classified ads, including a van driver position, a selling position with National Sub Service, and a position with Premier Network. RX-16, p. 7. Ms. Bailey indicated that Mr. Herrle also had gone back to the Jefferson Parish Personnel Office and the Employment Security Office but did not find any suitable positions. RX-16, p. 7.

In a January 19, 1996 entry, Ms. Bailey indicated that she contacted Torino Belts regarding a production worker position. RX-16, p. 7. Entry wages were \$4.25 per hour. RX-16, p. 7. Ms. Bailey also contacted Creole Delicacies, a position with entry wages of \$4.50 per hour. RX-16, p. 7. The Creole Delicacies position required standing, and a stool was provided that allowed for alternating positions. RX-16, p. 7. Ms. Bailey also noted a position with Rutter Rex that paid \$4.25 per hour and a position with Dixie Webb in which the individual could sit or stand. RX-16, p. 7.

Ms. Bailey formulated a final status report for Mr. Herrle on March 8, 1996. RX-16, p. 2. In a January 30, 1996 entry, Ms. Bailey indicated that Mr. Herrle reported going to the Jefferson Parish Personnel Office and Employment Security Office but that no positions were available for him. RX-16, pp. 2-3. According to Ms. Bailey, Mr. Herrle had also continued to look in the Times-Picayune for leads. RX-16, p. 3.

In a February 26, 1996 entry, Ms. Bailey indicated that she contacted Moon's Wrecker Service regarding a dispatcher opening. RX-16, p. 3. The entry wages were \$4.25 per hour. RX-16, p. 3. Ms. Bailey also indicated that there was a ticket seller position opening with City Park that paid \$4.25 per hour and a cashier position opening with Southern Parking that paid \$4.35 per hour. RX-16, p. 3.

In a March 7, 1996 entry, Ms. Bailey indicated that she visited Mr. Herrle at his home. RX-16, p. 4. According to Ms. Bailey, Mr. Herrle reported having migraine headaches and being in constant pain due to his knee. RX-16, p. 4. Ms. Bailey indicated that Mr. Herrle did not feel he was able to work due to his ailments. RX-16, p. 4.

In a March 18, 1996 document, Ms. Bailey indicated that Mr. Herrle's file was closed. RX-16, p. 1. Ms. Bailey indicated that Mr. Herrle did not feel he was able to participate in vocational rehabilitation services through her agency. RX-16, p. 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164

F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose “disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).” Id. With respect to the status requirement, § 2(3) defines an “employee” as “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker” Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. JX-2. At the time of his knee injury, Mr. Herrle worked for Avondale as a pipefitter. TR. 21. In addition, his knee injury occurred while Mr. Herrle was working on the deck of a ship in the Avondale shipyard. TR. 22; RX-22, pp. 7-8; CX-3, p. 111. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant’s employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). Furthermore, when an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986).

After the § 20(a) presumption has been established, the employer must introduce “substantial evidence” to rebut the presumption of compensability and show that the claim

is not one “arising out of or in the course of employment.” 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

Mr. Herrle testified that injured his right knee on July 12, 1993 when he tripped over cables at Avondale. TR. 22. Mr. Herrle’s knee injury and the events surrounding its occurrence are well documented in the medical evidence in this case. See RX-10, p. 1; RX-22, pp. 7-8; CX-3, p. 111. Therefore, the Court finds that Mr. Herrle has established a *prima facie* case of compensability and is entitled to the § 20(a) presumption regarding causation. Avondale does not contest the fact that Mr. Herrle suffered a right knee injury nor that this knee injury was work-related. JX-2. Therefore, the Court further finds that Mr. Herrle’s right knee injury was related to his employment with Avondale.

Mr. Herrle also alleges that he suffers from back pain which stems from his knee injury. TR. 56. Specifically, Mr. Herrle asserts that his back pain is a result of the antalgic gait he acquired after his knee injury. TR. 56. Having found that Mr. Herrle’s right knee injury was related to his employment, the Court now must determine whether Mr. Herrle’s subsequent back condition is a natural and unavoidable result of his original knee injury, such that Avondale would be responsible for both injuries.

First, the Court finds that Mr. Herrle has established a *prima facie* case of compensability with respect to his back condition and is entitled to the § 20(a) presumption. Based on Mr. Herrle’s testimony and medical records, he has had complaints of back pain as far back as February 1996. TR. 41-42; RX-22, pp. 18, 21-22; CX-3, pp. 22, 54. This evidence is corroborated by the testimony of Mrs. Herrle, who testified that Mr. Herrle complained of back pain everyday, and Mr. Herrle’s treating physician, Dr. Johnson, who testified that he did not doubt Mr. Herrle had back pain. TR. 82; RX-22, pp. 32-33. In addition, Dr. Johnson opined that Mr. Herrle’s low back pain was caused by his antalgic gait. CX-3, p. 17; RX-22, pp. 20, 31-33. Based on the foregoing, the Court finds that Mr. Herrle has demonstrated that he suffers from a back condition and that his work-related knee injury could be the cause of that harm.

Next, the Court finds that Avondale has successfully rebutted the §20(a) presumption. Dr. Lawrence Russo examined Mr. Herrle in March 1998 and opined that Mr. Herrle had osteoarthritis in his lumbar spine that pre-existed his knee replacement surgeries. CX-5, p. 2. Dr. Russo also indicated that having a total knee replacement or having some type of antalgic gait with a normal lumbar spine should cause little problems. CX-5, p. 2. Based

on Dr. Russo's impressions, the Court finds that Avondale has submitted evidence of an alternate cause of Mr. Herrle's back condition sufficient to rebut the § 20(a) presumption.

Because Avondale has rebutted the § 20(a) presumption, the issue of causation of Mr. Herrle's back condition must be resolved based on the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991). Although Dr. Russo determined that Mr. Herrle had pre-existent osteoarthritis in his back, Dr. Russo indicated that only 90% of Mr. Herrle's back complaints resulted from this pre-existing degenerative disc disease itself. CX-5, p. 2. Dr. Russo allocated 10% of Mr. Herrle's back problems to aggravation of his condition due to his knee injury. CX-5, p. 2. Dr. Johnson testified that he agreed with Dr. Russo's opinion that Mr. Herrle's back pain resulted from a pre-existing back condition that was aggravated by his knee condition. RX-22, pp. 45-46. Furthermore, Dr. Russo explained that while a total knee replacement surgery or an antalgic gait should cause few problems in someone with a normal lumbar spine, it was conceivable that Mr. Herrle's knee replacement work could have caused his back problems to become clinically significant given the pre-existent advanced degeneration in his lumbar spine. CX-5, p. 2. In addition, Dr. Tiel likewise opined that it would not be inconsistent for Mr. Herrle to have some degree of back pain as a result of compensating for the pain caused by his knee condition. RX-20, p. 29. Avondale has not presented evidence that counterbalances the opinions of Drs. Russo, Johnson, and Tiel. Based on the foregoing, the Court finds that the evidence as a whole weighs in favor of finding that Mr. Herrle's back condition did result from his antalgic gait, a natural consequence of his original work-related knee-injury.

NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any

disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Mr. Herrle reached maximum medical improvement on July 8, 1997. TR. 6-7. This stipulation is supported by Dr. Johnson's opinion in this case. RX-22, pp. 30, 43. Therefore, the Court finds that Mr. Herrle's disability became permanent on July 8, 1997.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this,

then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

The Court finds that Mr. Herrle has established a *prima facie* case of total disability. In a June 28, 1999 report, Dr. Johnson outlined Mr. Herrle's work restrictions based on his knee injury. CX-3, p. 9. Dr. Johnson indicated, among other things, that Mr. Herrle was capable of sitting continuously, walking for three hours, lifting and standing for two hours, and was not at all capable of sending, squatting, climbing, kneeling, or twisting. CX-3, p. 9. Dr. Johnson indicated that Mr. Herrle could lift up to 10-20 pounds. CX-3, p. 9. Based on Dr. Johnson's restrictions, the Court finds that the strenuous work required as a pipefitter exceeds Mr. Herrle's abilities and that Mr. Herrle has established he is not able to return to his job as a pipefitter at Avondale.⁷

The Court further finds that suitable alternative employment does not exist in this case. Seeking to establish suitable alternate employment in this case, Avondale has submitted reports from Nancy Favaloro spanning from 1995 to 2003. Ms. Favaloro identified jobs that included dispatcher and customer service positions, parking and toll collector positions, and security guard and productions worker positions. RX-17; RX-17(a). Likewise, Deby Bailey also helped Mr. Herrle in seeking employment. Ms. Bailey identified jobs that included dispatcher positions, cashier positions, and security guard positions. Although these jobs may fall within Dr. Johnson's work restrictions for Mr. Herrle, the Court is not persuaded Mr. Herrle is capable of any employment given his knee and back pains. Instead, the Court finds that Mr. Herrle was credible and accurate when he indicated that he was in disabling pain and could not work at all. TR. 30, 34, 76-77.

The Court finds that Dr. Johnson's work restrictions for Mr. Herrle cannot be the sole standard for Mr. Herrle's work capacity. Dr. Johnson did not take into account Mr. Herrle's back condition when he formulated his work restrictions. RX-22, p. 46. In addition, Ms. Favaloro testified that employment is probably precluded for someone in constant and severe pain. The evaluation of witnesses' credibility is for the trier of fact, and the Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Darcell v. FMC Corp., 14 BRBS 294, 296 (1981); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). Based on the Court's observation of Mr. Herrle and assessment of his

⁷ In addition, Dr. Juneau opined on February 1, 1995 that Mr. Herrle could work light duty status, but should not be involved in heavy labor, climbing, or repeated bending or stooping. RX-10, p. 3. Dr. Juneau indicated that Mr. Herrle also should not be involved in carrying objects greater than 50 pounds nor walking in elevated areas where he could fall and injure himself. RX-10, p. 3. Initially, the Court notes that Dr. Juneau's February 1995 assessment is dated because it occurred before the revision surgery to Mr. Herrle's knee. In any case, Dr. Juneau's opinion also supports finding that Mr. Herrle could not return to his employment as a pipefitter at Avondale.

testimony, the Court finds that Mr. Herrle's pain is constant and so severe that he is totally disabled from all employment. See Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 944-45, 25 BRBS 78, 80-81 (5th Cir. 1991).

Avondale also asserts that Mr. Herrle is not entitled to total disability benefits because he effectively retired from the work force some time around 1998. The Board has held that when a claimant voluntarily leaves the work force after sustaining a traumatic injury, total disability benefits may be denied on the basis that the claimant failed to establish a loss in wage earning capacity. See Hoffman v. Newport News Shipbuilding and Dry Dock Co., 35 BRBS 148, 149 (2001); Burson v. T. Smith & Son, Inc., 22 BRBS 124 (1989). The evidence indicates that Mr. Herrle ended his job search by 1998. TR. 74-75, 95. In addition, both Mr. Herrle and Mrs. Herrle testified that they have reservations about Mr. Herrle returning to work at age 70 and that they would have liked Mr. Herrle to retire normally from Avondale in 1998. TR. 66, 75-77, 104-105.

However, for the following reasons the Court is not persuaded by Avondale's argument. First, both Mr. and Mrs. Herrle made it clear that although they preferred that Mr. Herrle have retired normally from Avondale in 1998, such a retirement was precluded by Mr. Herrle's work injury. TR. 75-76, 105. Second, Mr. Herrle made it clear that retirement was not the reason he ended his job search. TR. 75. Instead, Mr. Herrle stopped looking for employment because of his pain. TR. 54, 75. Mr. Herrle testified that he still wanted to return to work but did not believe he could handle any employment given his pain. TR. 76. The Court finds Mr. Herrle's testimony credible. It is the Court's determination that Mr. Herrle has not retired and is willing to work. Furthermore, Mr. Herrle was justified in ending his job search because his pain was totally disabling, as previously determined by the Court.

Mr. Herrle injured his knee on July 12, 1993, which rendered him unable to return to his regular work at Avondale. JX-2; CX-3, p. 111. Mr. Herrle testified that his knee pain persisted despite all three of his surgeries and that his pain became worse than when he was first operated on. TR. 24-25, 35, 54. Avondale did not attempt to establish suitable alternate employment in this case until Nancy Favaloro's first labor market survey dated August 31, 1995. Because the Court finds that by August 31, 1995, Mr. Herrle's pain was so severe that it precluded all employment, the Court finds that Mr. Herrle has been totally disabled since his July 12, 1993 knee injury. Mr. Herrle reached maximum medical improvement on July 8, 1997. TR. 6-7; RX-22, pp. 30, 43. Therefore, Mr. Herrle was temporarily totally disabled from July 13, 1993 until July 8, 1997, and Mr. Herrle has been permanently totally disabled since July 9, 1997.

In addition, § 10(f) of the Act provides that a claimant's compensation shall be adjusted annually to reflect the rise in the national average weekly wage in all cases of injury that result in permanent total disability or death. See 33 U.S.C. § 910(f). Accordingly, upon

reaching a state of permanent and total disability on July 9, 1997, Mr. Herrle is entitled to annual cost of living increases pursuant to § 10(f) of the Act.

AVERAGE WEEKLY WAGE

The parties in this case have stipulated that Mr. Herrle's average weekly wage at the time of his injury was \$470.00. JX-2. This stipulation is supported by the evidence and is accepted by the Court. RX-2; RX-3; RX-4; RX-19, p. 8.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'd 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'd 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'd, 6 BRBS 550 (1977).

Because Mr. Herrle has established that he suffers from employment-related conditions in his right knee and back, Mr. Herrle is entitled to all past and future compensable medical benefits arising from those conditions. This medical treatment includes, but is not limited to, all reasonable and necessary: treatment for Mr. Herrle's right knee; treatment for Mr. Herrle's back from Dr. Warren Bourgeois, or another physician chosen by Mr. Herrle; epidural steroid injections for Mr. Herrle's back pain; pain management as suggested by Dr. Johnson; and any medicinal treatments that may be beneficial. TR. 47-49, 93-94; RX-20, p. 32; RX-22, pp. 21-23, 39, 51; CX-7, pp. 1-2. Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

- 1) Employer shall pay to Claimant compensation for temporary total disability benefits from July 13, 1993 until July 8, 1997, based on an average weekly wage of \$470.00.
- 2) Employer shall pay to Claimant compensation for permanent total disability benefits from July 9, 1997 and continuing, based on an average weekly wage of \$470.00. Such compensation shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act.
- 3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.
- 4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.
- 5) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with Section 1961, which are the result of Claimant's work-related knee and back conditions.

- 6) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

A

RICHARD D. MILLS

Administrative Law Judge